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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1672

ALMADEN VOLKSWAGEN, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the District of Columbia Circuit

CARMAN, MANSFIELD & MASON,
Community Bank Building,
111 West St. John Street,
San Jose, California 95113,
Telephone: (408) 293-1683,
Attorneys for Petitioner.

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Petitioner, Almaden Volkswagen, a California corporation, prays that a Writ of Certiorari issue to review a final order of the United States Court of Appeals for the District of Columbia Circuit affirming an Order of the National Labor Relations Board (NLRB). The opinion of the Court below in this case is unreported. It confirms the Order of the National Labor Relations Board ordering and compelling Petitioner's employees and petitioner to accept the Retail Clerks International Association as an exclusive bar-

gaining agent without the benefit of a secret NLRB election.

The Judgment of the Court of Appeals enforcing the National Labor Relations Board order was entered on March 14, 1973. The aforesaid Judgment is set forth in Appendix A. The timely Petition for Review was denied at the same time.

The jurisdiction of this Court is invoked under the Provisions of 28 U.S. Code, Section 1254 (i).

APPLICABLE STATUTES

The applicable law herein is the National Labor Relations Act, 29 U.S. Code, Sections 141, 151, 158 et seq., and Sections 8 (a) (1), (3), (5), Section 10 (e).

QUESTIONS PRESENTED FOR REVIEW

1. Is a labor union exempt from basic contractual requirements of offer, acceptance and certainty when it solicits employees for negotiating authority and for membership in the Union?

2. Is it inequitable to enforce an NLRB bargaining order denying employees the right of a secret election when in fact virtually all such employees who were involved in the initial union activity have voluntarily departed from petitioner's employment, and the NLRB bargaining order affects individuals who had nothing to do with the original activity and have no contractual privity with the Union?

3. Are "dual-purpose cards" encompassing both an application for membership and an authorization for the Union to represent the individual distinguishable from the requirements of "single-purpose cards" as delineated by this Court?

CONCISE STATEMENT OF THE CASE

Petitioner operated a Volkswagen dealership in San Jose, California. It hired a saleman who shortly thereafter contacted the Retail Clerks International Association, Automobile Salesmen's Union. Thereafter the Union invited some of petitioner's salesmen to an organizational meeting and solicited them to join the Union, stating also that the Union would represent them in bargaining with the employer. It tendered two documents to seven employees with instructions that they sign and complete the information requested on such documents.

The first document was an information sheet which requested the applicant's name and address, birth date, employer, marital status and citizenship, social security number, prior Union affiliation, short employment history, declaration and signature. Each salesman filled out and completed the aforesaid document.

The second document (Appendix D), was a membership application combined with a purported authority for the Union to represent the signatory in negotiating with the employer. It has been denoted by this Court as a "dual-purpose card". *National*

Labor Relations Board v. Gisel Packing, 395 U.S. 484. This "dual-purpose card" requested a substantial amount of detailed information from the membership applicant. In addition, it required certain affirmative action by the Union itself, as a condition precedent to the applicant becoming a member. For instance, the local Union executive board was required to act affirmatively on the application and subscribe the application.

At the bottom of the application was the following language:

> "We, the local Union Executive Board, report affirmatively on this applicant whose affiliation date is _____
>
> (Local Union Executive Officer's Signature)"

Of similar significance, with respect to the aforesaid was the Constitution of the Retail Clerks International Association, Section 32, (A), (B), which required the following action with respect to the foregoing:

> "APPLICATIONS AND BALLOTING FOR MEMBERSHIP —SECTION 32
>
> (A) All applications for membership in this International Association, either new members, reinstated members, or those entering the Local Union on withdrawal cards, shall be made on forms furnished by the International Association. Completed applications after approved by the Local Union, shall be forwarded to the International Secretary-Treasurer for his acceptance.
>
> (B) 1. All applications for membership shall be referred to the Local Union executive board,

which shall report its finding to the Local Union, and if adversely, give its reasons therefore if demanded by any member.

2. The applicant shall furnish on the application for membership such information as shall be required.

3. The report of the Local Union executive board on applications for membership shall be submitted to the Local Union and balloting on applications for membership shall be by open vote, and it shall require a majority vote of all members present to elect a candidate to membership.

4. A rejected candidate cannot be again voted upon within three months of the time of his rejection. The application of a rejected candidate shall be forwarded to the International Headquarters, accompanied by a statement signed by the Local Union executive board setting forth the reasons for such rejection."

None of the aforesaid requirements of the Union Constitution was fulfilled by the Local Union. Furthermore, there was no action taken by the Local Union Executive Board, and no local Union executive officer's signature appeared on the membership application.

Significantly the membership application itself was signed by six of the seven applicants, in blank. None of the required information set forth on the card was completed or inserted (name or location of the Local, applicant's name, address, birth date, telephone number, type of work, social security number, employer,

etc.) Above the signature of each individual was the following language:

> "I hereby make application for membership in the Retail Clerks International Association and affirm that the above statements are true, and I agree that all moneys paid by me shall be forfeited and my membership declared void if they are not true. I authorize the Retail Clerks International Association to represent me for the purposes of collective bargaining and handling of grievances either directly or through such local Union as it may duly designate."

The "dual-purpose" feature of the card was the last sentence above wherein the signatory authorized the Union to represent him for purposes of bargaining. All other portions of the application related to the subject of membership.

None of the information requested was at any time thereafter completed or placed on the application by the Union, nor was any action of any kind taken with respect to the applications. The documents were not shown or presented to management as evidence of Union authorization to bargain. Their existence was unknown to Petitioner until disclosed for the first time at the NLRB Hearing, approximately six months after they had been first received by the Union.

Subsequent to the aforesaid initial organizational meeting, a Union representative contacted petitioner. He claimed the Union represented the employees. A meeting was requested and it was agreed the same

would be held several days thereafter. Prior thereto, however, two of Petitioner's employees, both of whom had signed the aforesaid documents contacted petitioner's general manager and stated that several other employees as well as themselves desired to disclaim any association with the Union. At a sales meeting the following day, all employees present signed notes to the Union stating they were withdrawing their application to join the Union and their authorization for the Union to represent them. The NLRB claimed unfair practices and that the written withdrawals resulted from subtle coercion and encouragement by the petitioner.

Immediately thereafter, the Union petitioned the NLRB for an employee election, only to withdraw its petition several months later when it learned the NLRB intended to issue a compulsory Bargaining Order doing away with the requirement of a secret election. Petitioner at that time and at all times subsequently, has sought to have the Bargaining Order set aside, and to have the NLRB conduct a secret election allowing the employees to decide whether or not they desire Union representation.

In the interim period since the aforesaid events in September 1970, all of the employees involved have voluntarily departed from employment. None was terminated by petitioner. In addition, all of the individuals who at that time represented petitioner's management in respect to the aforesaid have also departed from petitioner's employment.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IGNORES THE REQUIREMENTS OF CONTRACTUAL PRIVITY REQUIRED BY THE NATIONAL LABOR RELATIONS ACT.

The National Labor Relations Act states in essence that the requirements of membership are determined by the Constitution and By-Laws of the organization. Applications for membership and authority granting the Union the right to bargain require compliance at least to a minimum degree as noted by the Act. Impliedly if not expressly the requirement is no greater or less than any other contractual agreement. A contract obviously embodies offer, acceptance and certainty among other things. Moreover, the documents herein which must of necessity be the keystone of the Union position, totally lack all of the aforesaid elements of a contract, either formal or informal.

If, in fact, the "dual-purpose card" had been completed by the applicant, then it could have been considered an offer to join the Union. In six of the seven applications, however, there was nothing but a mere signature, and as such the document could not be considered as an offer or an authorization because of its complete lack of certainty.

It is unnecessary to consider the NLRB contention that the revocations by the applicants were invalid, because not only was the purported offer void for uncertainty, but also the same never accepted or acted upon by the Union. The Union failed to abide by the requirements of its own Constitution as well as failing to act in any way to subscribe to the

application. In fact, it did nothing, including a total failure to meet the requirements of the National Labor Relations Act as noted above.

Restatement of Contracts, Section 25;
Toms v. Hellman (1931) 115 C.A. 74;
Anthony Macaroni Co. v. Nunziato (1935) 5 C.A.2d 588;
Sparks v. Mauk (1915) 170 C. 122;
Restatement of Contracts, Section 32;
Brown & Sons v. White Lunch Co. (1928) 92 C.A. 457;
Restatement of Contracts, Section 41.

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2. THE DECISION BELOW FAILS TO RESOLVE THE ISSUE OF DUAL-PURPOSE AND SINGLE PURPOSE CARDS. THE MATTER HAS NOT BEEN RESOLVED BY THIS COURT.

In all previous actions relative to validity of authorization cards, the Court has dealt with "single-purpose cards" or one which itself is solely for the purpose of either membership application or solely for the purpose of bargaining. This Court has not in any prior decision resolved the issue of "dual-purpose cards" as the same relate to the issues in this case. Chief Justice Warren in the *Gisel* case, *supra*, stated:

> "We need make no decision as to the conflicting approaches used with regard to 'dual-purpose cards', for in each of the five organization campaigns in the four cases before us, cards used were single-purpose cards stating fully and un-

ambiguously on their face that the signer designated the Union as his representative."

The issue of "dual-purpose cards" now requires resolution not only to resolve this matter, but as a guideline with respect to future labor-management relations.

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3. THE DECISION BELOW IS INEQUITABLE IN THAT IT WOULD APPLY TO INDIVIDUALS WHO TOOK NO PART IN THE ORIGINAL PROCEEDINGS AND WHO ARE THUS DEPRIVED OF A SECRET ELECTION TO DECIDE THE ISSUE OF A BARGAINING AGENT.

None of the present employees and none of the present management participated in the matters here in issue which occurred in September 1970. A Bargaining Order in the circumstances is punitive in that it deprives present employees of the right to determine their economic future by secret election process. It effectively deprives them of equal protection under the law. Furthermore, if in fact it could be argued that some type of privity existed as between the original employees and the Union, then that contention no longer has validity since all of those originally involved have departed.

The decision below thus completely ignores the condition of contractual privity. If allowed to stand, the decision means that a Union needs no documented authority of any kind in a purported claim seeking exclusive bargaining rights. In addition, it also means that the NLRB is not required to show a continuing privity between employees and the Union in respect to any order it may issue relating to the matter.

In the circumstances, the Bargaining Order is not only punitive, but sham, and is a mockery of the original intent of the law.

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4. THE DECISION BELOW RESULTS IN AN UNRESOLVED ISSUE WHICH DIRECTLY CONCERNS FUTURE LABOR-MANAGEMENT RELATIONS.

Consideration by this Court is necessary on the independent ground that the holding below leaves unanswered the legal interpretation of "dual-purpose cards". The *Gisel* case, *supra,* has only alluded to the issue, but the same is still unresolved. The issue raised by this case is of continuing importance and properly should be resolved by this Court. Currently, large numbers of "dual-purpose cards" are regularly used by Unions in factual situations such as herein noted. It is essential for both Unions, employees, and management that the Court establish specific guidelines to avoid confusion and litigation henceforth. The questions presented to the Court are of substantial significance to labor law in this country.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted not only to establish whether or not basic contract law is applicable to labor matters as herein noted, but also to clarify the use of "dual-purpose cards". In addition, the Court should decide whether imposition of a Bargaining

Order with respect to individuals who took no part in the original action and who have no privity of interest with the Union, is itself inequitable in the circumstances.

Dated, San Jose, California,
June 8, 1973.

CARMAN, MANSFIELD & MASON,
By E. DAY CARMAN,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

No. 71-1910

Almaden Volkswagen, a corporation,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

JUDGMENT

Before: Tamm, Circuit Judge, Elbert P. Tuttle,* Senior Circuit Judge for the Fifth Circuit, and Wilkey, Circuit Judge.

This Cause came on to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated October 13, 1971, against the above-named Petitioner, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on January 18, 1973, and has considered the briefs and transcript of record filed in this cause. On January 30, 1973, the Court being fully advised in the premises, entered an order denying the petition for review

*Sitting by designation pursuant to Title 28, U.S.C. §294(d).

and granting enforcement of the Board's said order. In conformity therewith, it is hereby

Ordered And Adjudged by the Court that the petition for review filed by Almaden Volkswagen, a corporation, be and it is hereby denied.

It Is Further Ordered And Adjudged by the Court that the said order of the National Labor Relations Board in said proceeding be enforced, and that Almaden Volkswagen, a corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ Edward Allen Tamm
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Elbert P. Tuttle
Senior Circuit Judge for the Fifth Circuit

/s/ Malcolm R. Wilkey
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

United States Court of Appeals for
the District of Columbia Circuit

Filed March 14, 1973
Hugh E. Kline, Clerk

Appendix B

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1972

No. 71-1910

Almaden Volkswagen, a corporation,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

Before: Elbert P. Tuttle*, Senior Circuit Judge for the Fifth Circuit; Tamm and Wilkey, Circuit Judges.

ORDER

On consideration of petitioner's petition for rehearing, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

*Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

Appendix C

193 NLRB No. 110

D—5639
San Jose, Calif.

United States of America
Before the National Labor Relations Board

Case 20—CA—6350

Almaden Volkswagen

and

Automobile Salesmen's Union, Local 1095
Retail Clerks International Association
AFL-CIO

DECISION AND ORDER

On July 20, 1971, Trial Examiner Maurice Alexandre issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief and the General Counsel filed

cross-exceptions. Respondent also requested oral argument.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, the cross-exceptions, and the entire record in the case, and hereby adopts the findings,[2] conclusions,[3] and recommendations of the Trial Examiner.

Contrary to Respondent's contention that a bargaining order is inappropriate in this case, we find, in agreement with the Trial Examiner, that Respondent's conduct warrants such a remedy. The unlawful

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[1]Respondent's request for oral argument is hereby denied. In our opinion, the record, including Respondent's exceptions and supporting brief, adequately presents the issues and positions of the parties.

[2]For the reasons set forth in his separate opinion in *United Packing Company of Iowa, Inc.*, 187 NLRB No. 132, Chairman Miller concurs in the issuance of a bargaining order but only on the basis of Respondent's numerous violations of Section 8(a)(1) and (3), referred to in the final paragraph of this opinion.

[3]The Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

acts, committed by two of Respondent's highest management representatives, began immediately after the Union's demand for recognition and reached each employee in the bargaining unit. Those employees not specifically questioned regarding their union sympathies were nonetheless present when Iglebak solicited and encouraged the resignations. They were all aware of Garbez' role in contacting the Union, and his discharge apparently weighed heavily in their deciding that "they had made a mistake." Further, they were all affected by the increased commission rates adopted as an inducement to prevent further organizational efforts. Such a combined application of both illegal stick and illegal carrot is not likely to be forgotten by any employee in the unit.

In view of the entire course of conduct of Respondent and the obvious widespread and continuing effect that conduct had on the employees, we have no doubt that the traditional remedies will neither erase the effects nor insure that such conduct will not recur. On balance, we find that the sentiments of the unit employees are more accurately expressed by the authorization cards than could be expressed by an election. Therefore, we adopt the Trial Examiner's conclusions in this regard.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that

Respondent Almaden Volkswagen, San Jose, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C.
Oct. 13,1971

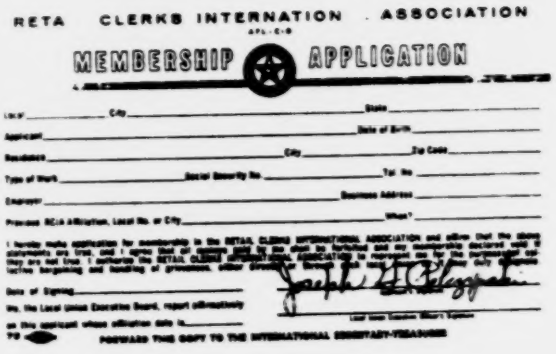
Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

Appendix D



RETA CLERKS INTERNATION . ASSOCIATION

AFL-CIO

MEMBERSHIP APPLICATION

Local _____ City _____ State _____

Applicant _____ Date of Birth _____

Residence _____ City _____ Zip Code _____

Type of Work _____ Social Security No. _____ Tel. No. _____

Employer _____ Business Address _____

Previous RCIA Affiliation, Local No. or City _____ When? _____

I hereby make application for membership in the RETAIL CLERKS INTERNATIONAL ASSOCIATION and affirm that the above statements are true, and I agree that all matters and to conform to the Constitution and all membership declared void if they are not true. I authorize the RETAIL CLERKS INTERNATIONAL ASSOCIATION to represent me for the purposes of collective bargaining and handling of grievances, either directly or through the local union duly chartered by the RETAIL CLERKS INTERNATIONAL ASSOCIATION.

Date of Signing _____ Applicant's Signature _____

We, the Local Union Executive Board, report affirmatively on this applicant whose affiliation date is _____

Local Union Executive Board Member

TO FORWARD THIS COPY TO THE INTERNATIONAL SECRETARY-TREASURER

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1672

ALMADEN VOLKSWAGEN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. In an unfair labor practice proceeding, the National Labor Relations Board found that petitioner ("the Company") had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by interfering with the rights of its employees to engage in union activities, and by discharging employee Thomas M. Garbez because of his support of the Union[1] and conditioning his reinstatement upon resignation from the Union (A. 8, 12-13, 15, 18, 24).[2] The Board

[1] Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO.

[2] "A." references are to the Appendix filed with the court below, which we are lodging with the Clerk.

further found that the Union had obtained valid authorization cards from a majority of the employees in an appropriate unit (A. 21), and that, in view of the extensive unfair labor practices, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (A. 23). The Board ordered the Company to cease and desist from the unfair labor practices; to reinstate with backpay the discharged employee; and to bargain with the Union upon request (A. 26-28; Pet. App. C, pp. vi-vii). The court of appeals enforced the Board's order in full (Pet. App. A).

2. Petitioner does not challenge the Board's findings that it violated Section 8(a)(1) and (3) of the Act, or that it refused to bargain with the Union. Instead, relying in part upon this Court's decision in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, it contends that the Board's bargaining order was improper. This contention was properly rejected below (see *e.g.*, Pet. App. C, pp. v-vi) and further review is unwarranted.

a. Petitioner contends that the authorization cards designating the Union as the employees' bargaining representative were invalid because they were conditioned upon the signer's admission into membership in the Union. The cards, however, recited: "I authorize the RETAIL CLERKS INTERNATIONAL ASSOCIATION to represent me for the purposes of collective bargaining and handling of grievances, either directly or through such local union as it may designate" (Pet. App. D). The Union representatives not only read the above-quoted statement to the employees before they signed the cards but also emphasized that execution of the cards authorized the Union to act as their bargaining representative (A. 21-22). Under these circumstances each signatory

intended to authorize the Union to represent him for collective bargaining purposes, and the cards were valid authorizations. *National Labor Relations Board* v. *Gissel Packing Co., supra,* 395 U.S. at 584.[3]

b. Petitioner also contends (Pet. 9-10) that review by this Court is warranted to resolve "the issue of 'dual-purpose cards' " (Pet. 9). That issue, however, is not presented here, since the authorization cards in the instant case (Pet. App. D) are authorizations for collective bargaining and are not dual purpose.[4]

c. Finally, petitioner contends (Pet. 10-11) that the court of appeals should have considered employee turnover in determining whether the Board's bargaining order was proper. Since petitioner did not raise this issue before either the Board or the court below, it cannot raise that issue now. See *Marshall Field &*

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[3] Contrary to petitioner's suggestion (Pet. 8), neither the employees' failure to complete the information requested on the cards (information which was, in any event, provided on an accompanying "information sheet") nor the Union's failure to "act upon" the membership applications affects the validity of the cards. The touchstone in determining the validity of authorization cards is "not whether membership [in the Union] was perfected, * * * [but] whether the card signers intended to designate the Union as their collective bargaining representative" (A. 22). See *Lebanon Steel Foundry* v. *National Labor Relations Board,* 130 F. 2d 404, 407 (C.A.D.C.), certiorari denied, 317 U.S. 659.

[4] The issue referred to arises when it is not clear whether union members thought they were signing cards authorizing the union to represent them "for collective bargaining purposes or merely to authorize it to seek an election to determine that issue." *National Labor Relations Board* v. *Gissel Packing, Inc., supra,* 395 U.S. at 604.

Co. v. *National Labor Relations Board,* 318 U.S. 253, 255-236.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JULY 1973.

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[5] In any event, turnover of personnel presents no bar to the enforcement of the Board's bargaining order. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 705; *National Labor Relations Board* v. *Katz,* 369 U.S. 736, 748, n. 16; *National Labor Relations Board* v. *Gissel Packing Co., supra,* 395 U.S. at 610, especially where as here, the loss of Union employees is linked to unfair labor practices discouraging Union membership (see A. p. 23-24).